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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1032

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Petitioner, Scott Hudgens, an individual (herein "Hudgens"), respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in this case on October 7, 1974. This decision became final for the purpose of review by this Court on January 22, 1975 when the Supreme Court of Georgia denied petitioner's writ of certiorari.

OPINIONS BELOW

The opinion of the Georgia Superior Court is not and will not be reported; it is reprinted as Appendix A hereto. The initial decision of the Georgia Supreme Court, holding that it lacked jurisdiction to hear an appeal directly from the Superior Court, is reported at 231 Ga. 669, 203 S.E. 2d 478 (1974), and is

reprinted at Appendix B. The subsequent opinion of the Georgia Court of Appeals and order denying rehearing are not as yet reported and are attached as Appendix C and D. The Georgia Supreme Court's denial of petitioner's writ of certiorari is not reported and is reprinted as Appendix E hereto.

JURISDICTION

The opinion of the Court of Appeals of Georgia (App. C, p. A4) issued on October 7, 1974 and became final, for purposes of review by this Court, when the Supreme Court of Georgia denied petitioner's writ of certiorari on January 22, 1975. (App. E, p. A12.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether state courts are preempted by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, from determining whether the unauthorized entry of union pickets on private property constitutes a trespass within the meaning of state criminal trespass statutes.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (herein "the Labor Act"); the Georgia Criminal Trespass Law, Title 26, Ga. Code Ann. § 1503 (herein "the Criminal Trespass Statute"); and the Georgia Declaratory Judgment Act, Title 110, Ga. Code Ann. § 1101, are set forth in the Appendix. (App. F, p. A13-15.)

STATEMENT OF THE CASE

Scott Hudgens, an individual employer with principal offices in Atlanta, Georgia, owns the North DeKalb Shopping Center located in a partially residential, partially small business area of unincorporated DeKalb County, Georgia. The Center is private property.

Local 315, Retail, Wholesale Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The Union represents, *inter alia,* employees of the Butler Shoe Company, an employer who maintains a retail store in the Center.

As a result of a dispute between the Union and Butler over the terms of a new collective bargaining agreement, on January 22, 1971, various members of the Union, acting under its authority, appeared on the interior mall property of the Center in order to picket the Butler store. As soon as the pickets were observed by an agent of Hudgens, they were asked to cease their activities and leave the mall area pursuant to Hudgens' well-established, non-discriminatory policy of forbidding all non-commercial activities on Center premises.[1] The pickets left but returned and resumed picketing which ceased only after they were threatened with arrest under the Georgia Criminal Trespass Statute if they failed to depart. The Union, however, thereafter filed unfair labor practice charges with the National Labor Relations Board, alleging that Hudgens improperly excluded the pickets, and has continued to press those charges.[2]

1. See *Steffel* v. *Thompson,* ..... U.S. ....., 39 L. Ed. 2d 505, 512 (1974), which involved Hudgens' exclusion, pursuant to the Criminal Trespass Statute, of Viet Nam war protestors from the North DeKalb Shopping Center. The pendency of the instant action is referred to an n. 22 (..... U.S. ..... at ....., 39 L. Ed. 2d at 524) of that opinion.

2. The Board originally determined that Hudgens had committed an unfair labor practice by excluding the Union pickets (192 NLRB 671). Subsequently, after Hudgens had sought review of this decision, this Court decided *Lloyd Corp.* v. *Tanner,*

For example, as late as October 30, 1974, the Union intervened in proceedings involving those charges then pending before the United States Court of Appeals for the Fifth Circuit.[3] Accordingly, since the Union continues to contend that it has a right to picket upon Hudgens' private property, there is a substantial likelihood that picketing on Center property will occur whenever the Union has a dispute with either Butler or any other Center tenant. Such picketing, Hudgens believes, would constitute a violation of the Criminal Trespass Statute.

As a result of this continuing dispute with the Union, and the likelihood of a resumption of its disputed activities, Hudgens filed the present action under the Georgia Declaratory Judgment Act seeking a declaration that the Union would be in violation of the Criminal Trespass Statute if it engaged in unauthorized entry upon Hudgens' private property. The Union replied by filing a motion to dismiss and a plea to jurisdiction which argued that the dispute was wholly within the jurisdiction of the National Labor Relations Board (App. A, p. A1).

A hearing, not on the merits of the case, but on the motion to dismiss and the plea to jurisdiction, was held on June 26, 1973 in the Superior Court of Fulton County. That Court ruled that jurisdiction of the dispute lay solely with the Labor Board and that the complaint failed to present "a claim cognizable in equity" (App. A, p. A2). The Court of Appeals,[4] addressing

407 U.S. 551 (1973), and *Central Hardware* v. *N.L.R.B.*, 407 U.S. 539 (1973). In light of those cases, the Board obtained a remand from the Fifth Circuit Court of Appeals to reconsider its earlier decision. On remand, the Board (205 NLRB No. 104) proceeded to affirm its previous decision and that decision was, in turn, affirmed by the Court of Appeals, 501 F.2d 161.

3. Hudgens has filed a petition for writ of certiorari in this Court (No. 74-773) from the decision of the Fifth Circuit which is presently pending. On February 11, 1975, Hudgens filed a motion to defer consideration of that Petition until the instant petition was filed.

4. Hudgens had sought direct review by the Georgia Supreme Court since its action arguably raised equitable questions involving the constitutionality of a state statute. The Georgia Supreme Court, however, concluded that it was without jurisdiction (App. B, p. A3) and transferred the appeal to the Court of Appeals.

only the jurisdictional issue, affirmed (App. C, p. A11) and denied petitioner's motion for rehearing (App. D, p. A12). Hudgens' subsequent Court application for certiorari was denied by the Georgia Supreme Court without opinion (App. D, p. A12).

REASONS FOR GRANTING THE WRIT

A. This Case Presents a Significant Question of Federal Law Which Has Not Been, But Should Be, Decided by This Court

This Court should grant review in order to resolve a substantial, recurrent question not heretofore decided by this Court, *viz.*, whether, under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), state courts retain jurisdiction to declare a trespass by union pickets on private property to be violative of state law.

This Court previously recognized the importance of this issue in *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), and *Taggart* v. *Weinacker's*, 397 U.S. 223 (1970). In both cases, certiorari was granted as to the very same question as that presented here. In *Logan Valley*, however, the Court did not reach this question (391 U.S. at 309, n.1; see also the dissenting opinion of Mr. Justice Harlan, 391 U.S. at 333) and the issue was similarly left undecided in *Taggart* when the writ of certiorari there was dismissed as improvidently granted. 397 U.S. at 226. The Chief Justice, in a concurring opinion in *Taggart*, did note that, in his opinion, contrary to the decision of the Georgia courts in this case:

> "[A]ny contention that the States are preempted is without merit. . . . Nothing in [*Garmon*] . . . would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing. . . . A holding that Congress preempted this entire area is as inappropriate here as it was in *Linn* [v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966)],

> and for precisely the same reasons. Cf. *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. at 201, 25 L. Ed. 2d at 223 (White J., concurring)."

397 U.S. at 227-29. Mr. Justice Harlan's separate memorandum in *Taggart* disagreed with the Chief Justice's opinion, as well as the view of Mr. Justice White (joined by The Chief Justice and Mr. Justice Stewart) in *Ariadne*, for essentially the same reasons as those relied on by the court below. 397 U.S. at 229-231.

The instant case presents this Court with an appropriate vehicle to resolve this undecided question. If, on the other hand, the decision below is allowed to stand, there will be a number of undesirable results: (1) the present uncertainty and conflict as to whether the States have jurisdiction in the instant circumstances to enforce their trespass laws will continue with the consequence that the rights of unions and employers will vary from forum to forum; (2) States, such as Georgia, which have concluded that their jurisdiction is preempted, will be unable to protect a "deeply rooted" state interest which is of only "peripheral concern" to the Labor Act—the protection of private property rights from trespass (*Taggart*, 397 U.S. at 227-229 (Burger, C. J., concurring)); and (3) property owners will have to rely solely on self-help to protect their property from trespass, with a consequent threat to domestic peace.

B. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the States

One of the reasons this Court granted certiorari in *Linn* was to resolve a similar preemption conflict *i.e.*, the extent to which the labor act preempted state libel action jurisdiction, because "[t]he question . . . has been a recurring one in both state and federal tribunals." 383 U.S. at 57. (footnote omitted) The question presented in this case is of the same magnitude. The extent to which the Labor Act supercedes the jurisdiction of state courts to protect their constituents' private property from trespass has been a recurrent question whose resolution has varied from state to state.

Contrary to the decision below, the courts of many states have asserted jurisdiction, notwithstanding *Garmon*, to decide whether union pickets have trespassed private property in violation of state law. See, *e.g.*, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385, *cert den.*, 368 U.S. 927 (1961), where the Illinois Supreme Court enjoined picketing on a private parking lot;[5] *Marriott Corp.* v. *Rosado*, 70 Misc. 2d 423, 333 N.Y.S. 2d 114 (1972), *aff'd*, 353 N.Y.S. 2d 924 (App. Div. 1974), where union picketing at various terminal buildings at Kennedy and LaGuardia Airports was enjoined; *Jack Loeks Enterprises* v. *Local 291*, 87 LRRM 3105 (No. 74 16697 CZ (Mich. Cir. Ct., Kent County, November 15, 1974), where a preliminary injunction was issued to restrain union picketing on the "parking lot, sidewalk, theatre building, or other associated areas" of a shopping center tenant; *Moreland Corp.* v. *Retail Store Employees Union*, 16 Wisc. 2d 499, 114 N.W. 2d 876 (1962), where the Wisconsin Supreme Court upheld an injunction prohibiting union members from picketing on the private property of a shopping center; and *Hood* v. *Stafford*, 213 Tenn. 684, 378 S.W. 2d 766 (1964), where the Tennessee Supreme Court concluded that it had jurisdiction to enforce against a union picket a state statute which proscribed entering a business or standing outside it for the purpose of enticing anyone therefrom. Other state courts, however, like the Georgia courts in the present case, have reached an opposite result and considered their jurisdiction preempted under *Garmon*.[6] Review by this Court is warranted

5. The Court held that the "State's interest in preserving domestic peace" and "the company's right to protect its property interests" justified an assertion of jurisdiction; it reasoned that "[t]he basic purpose of the statute is the prevention of violence or threats of violence . . .;" that had the State not intervened the employer would have had to forcefully remove the pickets; and that had the employer used force, "the threat of violence . . . [would have been] imminent." 174 N.E. 2d at 388. Thus, the Court rested its holding on a state court's traditional jurisdiction to enjoin violent conduct even where that conduct is also an unfair labor practice under the Labor Act. See, e.g., *United Auto Workers* v. *W.E.R.B.*, 351 U.S. 266 (1956).

6. See, e.g., *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 363 P. 2d 803 (1961), where the Supreme Court

therefore, to resolve a question of federal preemption which has divided state courts and resulted in a concommitant dislocation of national labor policy.

C. The Court Below Has Misconstrued the Decisions of This Court

The court below misconstrued *Garmon*. That case expressly recognized that where—as in the case of trespass—the activity involved is "a merely peripheral concern of the Labor Management Relations Act" or ". . . where the regulated conduct touches interests . . . deeply rooted in local feeling or responsibility" (*Garmon*, 395 U.S. at 243, 244), state jurisdiction is not preempted. The picketing here is encompassed by these principles.

First, unauthorized picketing on private property does not fall within either the proscription or protection of the Labor Act. As the Chief Justice observed in his concurrent opinion in *Taggart:* "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises." 397 U.S. at 227.[7] This un-

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of Washington held that, since an action for trespass by a shopping center owner against a labor union was an "arguable subject" of the Labor Act, the Court did not have subject matter jurisdiction; *United Maintenance Co.* v. *Steelworkers*, 86 L.R.R.M. 2364 (No. 13405, West Va. Ct. App., April 9, 1974), where the Court held that it lacked jurisdiction to enjoin a trespass; and *Hennepin Broadcasting Associates* v. *AFTRA*, 84 LRRM 2218 (No. 696356 Minn. Dist. Ct., 4th Dist., Aug. 7, 1973), where the Court denied a motion for a temporary order restraining union picketing on or near a radio station's premises on the ground that its jurisdiction was preempted.

7. See also *e.g., Organizing And The Law, A Handbook for Union Organizers* (1967), by Stephen I. Schlossberg, General Counsel, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does so *without the protection of the Labor Act.* The em-

availability of a Board remedy "vitiates the ordinary arguments for preemption." *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. at 64; see also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1363 (1972); and Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassing Union Activity*, 83 Harv. L. Rev. 552, 558, 567 (1970). Of course, as in this case, a union may claim that an employer, by invoking self-help or a state trespass law, has violated the Labor Act. The applicability of the state trespass law, however, will be merely incidental, if not irrelevant, to the resolution of that claim. See the petition in No. 74-773, and the underlying decisions therein cited at note 2, *supra*. The necessity of providing a state remedy here, in the absence of providing a federal remedy, is surely as compelling as the converse situation dealt with by this Court in *Steffel*.

Second, trespass is surely a matter which is deeply rooted in local concern. To again quote the Chief Justice in *Taggart:* "The protection of private property . . . through trespass laws is historically a concern of state law." 397 U.S. at 227. There is, after all, an "overriding state interest . . . involved in the maintenance of domestic peace" (*Plumbers Union* v. *Borden*, 373 U.S. 690, 693 (1963)), and the basic purpose of trespass statutes, such as the Criminal Trespass Statute, is "the prevention of violence or threats of violence" *People* v. *Goduto*, 174 N.E. 2d at 387.

The Georgia courts thus have concurrent power, alongside the National Labor Relations Board, to entertain actions involving unauthorized union entry on private property. This is not an unusual situation in labor law; the States and the Labor

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ployer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from his property. *There is, however, no section of the Taft-Hartley Act available to the employer in this situation.*" (emphasis added.)

Board also have concurrent authority in cases involving libel (*Linn* v. *United Plant Guard Workers Local 114, supra*); breach of a union's duty of fair representation (*Vaca* v. *Sipes*, 386 U.S. 171 (1967)); and picketing where there has been violence or threats of violence (*United Auto Workers* v. *W.E.R.B.*, 351 U.S. 266 (1956)). There may be, in addition, other instances where the Labor Board will defer to state courts for their construction of relevant state law.[8] All of these cases involved an area of traditional state concern which has been regulated by a state law of general application. Trespass is another important state interest, which is similarly regulated by a law of general application. Contrary to the decision below, *Garmon*, it is submitted, did not preclude the States from uniform enforcement of its trespass laws.

8. See, *e.g.*, *Stein Printing*, 204 NLRB No. 2, where the Board, in determining whether an employer had violated Section 8(a)(2) of the Labor Act, utilized a Georgia court's (*Stein Printing Co.* v. *A.T.U., Local No. 48*, Nos. B-66437 and B-67125; 83 LRRM 3029 (1973) construction of its Right-to-Work Law, 54 Ga. Code Ann. § 904) A utilization of the Criminal Trespass Law, as is interpreted by the Georgia courts in this case, would have been similarly desirable in the Hudgens' companion Board case (No. 74-773). Indeed, a decision in the instant case might have presented "substantial and immediate possibility of obviating [the Union's] federal claim by a decision on state law grounds." *Steffel*, 39 L. Ed. 2d at 524, n. 22. A finding, for example, that Hudgen's had no basis for invoking the Criminal Trespass Law against the Union, while not dispositive of the Board case, would, in effect, have negated Hudgen's principal defense in that matter.

CONCLUSION

For all the foregoing reasons, Scott Hudgens respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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